SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 719

HENRY HINTON FAVORS, PETITIONER,

vs.

IRA M. COINER, ACTING WARDEN, WEST VIRGINIA STATE PENITENTIARY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

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1-3 IN THE STATE SUPREME COURT OF APPEALS
CHARLESTON, WEST VIRGINIA

In the Matter of: STATE OF WEST VIRGINIA EX-REL, ss,
HENRY HINTON FAVORS, Petitioner

vs.

IRA M. COINER, West Virginia State Penitentiary,
Moundsville, W. Va., Respondent

UPON APPLICATION FOR WRIT OF HABEAS CORPUS

To the Honorable, The Presiding Judges, of the State Supreme Court of Appeals, Charleston, West Virginia:

KIND OF ACTION

This is a habeas corpus proceeding in the State Supreme Court of Appeals, Kanawha County, Charleston, W. Va. This petition is designed to attack the validity of the sentence of twenty-five (25) years imposed by the Intermediate Court of Kanawha County, on the 28 day of October, 1953.

THE ISSUE AND HOW RAISED

The issue is: Whether or not the petitioner, Henry Hinton Favors, is legally subject to be sentenced to be confined in the W. Va. State Penitentiary for twenty-five years under indictment No. 340.

The issue is raised: by the petition of the petitioner, Henry Hinton Favors, for a writ of habeas corpus based on errors in the records filed in the State Supreme Court of Appeals of West Virginia alleging that he is illegally imprisoned, detained, confined and restrained in the State Penitentiary by reason that he was convicted upon false evidence given under oath by the state witness, and without due process of law, which will be shown hereinafter.

4 EVIDENCE SUBMITTED

Exhibit "A" Page 8. A true and correct copy of affidavit by George Head, Jr.

Exhibit "B" Page 9. A true and correct copy of statement by William L. Lonesome, Attorney, who represented the case.

Exhibit "C" Page 10. A true and correct copy of letter received from M. H. Hix, Clerk of said court.

Exhibit "D" Pages 11 to 13. Indictment and orders.

Case History Brief Statement of Facts

Your Honors Sir:

During the regular September 1953 term of the Intermediate Court of Kanawha County, West Virginia, the grand jurors returned a joint indictment against Henry Hinton Favors, (petitioner) and George Head, Jr. (co-defendant) on the charge, alleging: "Robbery by violence", upon one Frank Alesci.

The Honorable William J. Thompson, Judge of said court appointed attorney William L. Lonesome, to jointly represent the co-defendants in this case.

Shortly thereafter, Mr. Lonesome, our attorney, advised that we both plead guilty to the above charge, and he would get us ter years. George Head, Jr. co-defendant, agreed to do so however, the petitioner refused. Mr. Lonesome, realizing the conflict of plea, sought to have himself disqualified in the petitioner's case, but was not permitted. The petitioner, Henry Hinton Favors, objected in open court to this arrangement, and asked the judge to appoint attorney J. Raymond Gordon to represent his side. Whereupon the judge called the prosecuting attorney, along with Mr. Lonesome and myself for a conference on this subject. The petitioner's repeated his request for the appointment of another counsel, but the judge stated: I appointed Mr. Lonesome to represent you both in this case. The court hasn't time to appoint you another counsel; that the dockets must be cleared without interruption." Therefore, Mr. Lonesome remained through out the case, counsel for both co-defendants.

On trial date, October 27th, 1953, the offended party, a Mr. Frank Alesci, was placed on the witness stand and testified on direct examination that he could not swear the petitioner, Henry Hinton Favors, was one of the men who robbed him.

George Head, Jr. being one of the defendants in the case, who had earlied pled "guilty" to the charge was called from the county jail as a state witness. He was placed on the witness stand and testified on direct examina-

tion that the petitioner, Henry Hinton Favors was not with him at the commission of said crime.

The attorney for the state, a Mr. J. Blackburn Watts, immediately asked for and was granted a fifteen minutes recess.

During this recess, George Head, Jr. was removed from the court room to the office of the attorney for the state, where he was threatened with a life sentence by the attorney for the state if he did not get back on the witness stand and say that the petitioner Henry Hinton Favors was with him on said crime.

Following this recess, George Head, Jr. was again placed on the witness stand and testified that the petitioner, Henry Hinton Favors, had been with him on said crime.

See: 1937 Code 61-5-3, Penalties for perjury subornation of perjury, and false swearing—cited in Rice vs. Builders Material Co., W. Va. 2 S. E. (2d) 527.

The petitioner, Henry Hinton Favors, stood trial and subsequently was found guilty, on the 28th day of October, 1953, and sentenced to twenty-five years in the W. Va. State Penitentiary.

A stay of the foregoing sentence was ordered by the court until January 20th, 1954, pending an appeal for writ of error and supersedeas. Petitioner paid Mr. Lonesome $20.00 to institute these proceedings. Petitioner has no knowledge of the results of the appeal.

On the 27th day of January, 1954, petitioner was remanded to jail to begin serving said sentence.

The petitioner are not unmindful of the rule stated by your Honors that a writ of habeas corpus is not to be substituted for a writ of error, however, your Honors have held that a proceeding for a writ of habeas corpus is the proper method of testing the legality of the petitioner's confinement and if the confinement is void the writ will lie, moreover, if the sentence of imprisonment is valid in part and void in part, and the sentence is serveable, the judgment of sentence may be reviewed and corrected in a habeas corpus proceeding. *State* v. *Skeen, supra, Dye* v. *Skeen, supra.*

CAUSE FOR ACTION

6 (1) The petitioner respectfully alleges that his present sentence is invalid—contrary to the W. Va. and United States Constitution; having been convicted without counsel—the court having lost jurisdiction in the case when said court permitted and compelled one counsel to represent two co-defendants of unlike pleas in the same case. Petitioner having plead not guilty and stood trial, whereas, co-defendand, George Head, Jr. plead guilty.

(2) It is the contention of the petitioner that when George Head, Jr. changed his testimony it should have been scratched from the records.

By the court accepting George Head, Jr. false testimony, the court lost jurisdiction to proceed and the verdict and judgement which were returned after loss of jurisdiction are invalid as herein shown.

(3) The petitioner received twenty-five years and George Head, Jr. received ten years, although he was indicted for the same crime.

(4) The petitioner was taken out of his bed and arrested without a warrant and there was no one to identify him, violating the 4th Amendment which states: "The rights of the people to be secure in their homes." Let the records show that the petitioner is telling the truth.

POINTS OF LAW—AUTHORITIES RELIED UPON

6th Amendment to the U. S. Constitution:

"In all criminal prosecutions, the accused shall have the proper assistance of counsel."

14th Amendment to the U. S. Constitution:

"Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Johnson V. Zerbst, 304 U.S. 458, 58, S. Ct. 1019, 1024, 82 Le. Ed. 1461, 146 A. Le. R. 357:

"That as soon as the defendant is deprived of proper counsel thereby depriving him of his life and liberty . . . "The court loses jurisdiction to proceed."

Wright V. Johnson: 77 Fed. Supp. 687.

"Court held the writ to be sustainable and ordered Johnson, Warden of Alcatraz (9th C.C.A.) to release Wright. Court held that where one defendant pleads guilty and the other requests trial, that the attorney was
7 placed in the impossible situation of supporting two opposite points of view, that each defendant is entitled to counsel devoted solely to his own interest, that in this case the attorney, in presuming to represent two opposite points of view, had disqualified himself to represent either side of the case, and that Wright, the petitioner had, in effect, no counsel at all.

U. S. 45, 53, S. ct. 55, 77 L. Ed. 158, 84, A.L.R. 527:

So we are clear that the "assistance of counsel" guaranteed by the 6th Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired.

In Hawk v. Olson, 326, U.S. 271, 66 S. ct. 116, 90 L. Ed:

"A Habeas Corpus proceeding, the writ was held to be sustainable where it is shown "That no effective assistance of counsel was furnished in the critical time between the plea of not guilty and the calling of the jury; holding that such claimed fundamental error denying constitutional rights may be adjudicated in a habeas corpus proceeding."

(Emphasis supplied) —— Id, at page 278 of 326 U. S. at 120 of 66 S. ct.

U.S.C.A. Const. Amends. 5, 6,—Id.

Expense to government of separate trial is no factor in determining co-defendant's right of counsel independant of other defendants who accuse him.

ARGUMENT

The petitioner has proven beyond a reasonable doubt that he objected to the same counsel throughout the proceeding of the case; that he objected to the same counsel

representing both co-defendants on the same indictment with unlike pleas; has shown that the judge was motivated for reasons of haste and expenses to the court; has further shown by appropriate authorities that his conviction is invalid.

PRAYER

Because of the merit of this case, the petitioner prays for the issuance of writ of habeas corpus from under the seal of this Honorable Court, the petitioner further prays that this Honorable Court act favorable upon his petition to proceed in forma pauperis, whereas the petitioner will ever pray. He swears under oath that the foregoing is true to the best of his knowledge.

Respectfully submitted,

Signed HENRY H. FAVORS.

AFFIDAVIT

STATE OF WEST VIRGINIA,
County of Marshall, City of Moundsville, ss.

In the year of our Lord, 1956, A.D., on the —— day of ——, in the County of Marshall, City of Moundsville, State of West Virginia.

I, George Head, Jr. of the city of Charleston, County of Kanawha, State of West Virginia, do swear under oath and of my own free will, so help me God. Whereas; in consideration of one, Henry H. Favors, #39423 who is being made to serve a twenty-five years sentence in the Penitentiary, located in the County of Marshall, 818 Jefferson Avenue, Moundsville, West Virginia, that he Henry H. Favors, is innocent of this crime for which he is being made to serve time, that I, George W. Head, Jr., being one of the defendants who entered a guilty plea in the Intermediate Court of Kanawha County, State of West Virginia, in the October term of Court 1953, A.D. to the charge of unarmed robbery, that the aforesaid, Henry H.

Favors, is wrongfully accused. I George W. Head, Jr. told the court that he, Henry H. Favors, was not with me at the time of this crime. The Prosecuting Attorney then called for a fifteen minute recess and during this recess, he the Prosecuting Attorney, took me, George W. Head, Jr., into his office and threatened to give me a life sentence if I didn't change my statement and say that Henry H. Favors was with me. I will defend this same innocent man against any person or persons at any time against anyone claiming the aforesaid defendant, Henry H. Favors, #39423 guilty. I will ever pray in witness whereof, I have hereunto set my hand.

(Seal) —— ——

My Commission Expires —— ——

—— ——

Notary Public.

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9 EXHIBIT B TO APPLICATION FOR WRIT OF HABEAS CORPUS

WILLIAM L. LONESOME

Attorney at Law

503 Court St.

Charleston 1, W. Va.

November 4, 1955.

Mr. Henry Hinton Favors,
West Virginia Penitentiary,
818 Jefferson Avenue,
Moundsville, West Virginia

Dear Mr. Favors:

Some time ago you wrote me requesting a statement to the effect that at your trial in the Intermediate Court of this County that the Court had also appointed me to represent a co-defendant, George Head, Jr.

This is to inform you that at your trial I did represent George Head, Jr., along with you and that George Head Jr. pleaded guilty that your case was tried and that you were found guilty, and that further George Head Jr. testified on

direct examination that you were not with him when the particular robbery of which you were convicted took place and that subsequent thereto the prosecuting attorney requested a recess took George Head Jr. off the stand and talked with him and then he came back and changed the story and stated that you were with him at the time of the commission of the crime.

I hope that this statement is satisfactory.

Yours truly, Wm. L. Lonesome, Attorney-at-Law.

WLL/mb.

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10 EXHIBIT "C" TO APPLICATION FOR WRIT OF HABEAS CORPUS

KANAWHA COUNTY
CIRCUIT, COMMON PLEAS, DOMESTIC RELATIONS AND INTERMEDIATE COURTS

CLERK'S OFFICE

H. H. HIX, Clerk

Charleston, West Virginia,

September 14, 1955

Henry H. Favors,
Serial No. 39423,
818 Jefferson Avenue,
Moundsville, West Virginia

Dear Mr. Favors:

Referring to your memorandum of September 13th.

The Poor Person's Affidavit filed in this case shows that William L. Lonesome was appointed to represent Henry Hinto Favors and George Head, Jr. During the October Term of the Intermediate Court.

Very truly yours, M. H. Hix, Clerk.

MHH/mls.

11 EXHIBIT "D" TO APPLICATION FOR WRIT OF HABEAS CORPUS

KANAWHA COUNTY
CIRCUIT, COMMON PLEAS, DOMESTIC RELATIONS AND INTERMEDIATE COURTS.

Clerk's Office

M. H. Hix, Clerk

Charleston, West Virginia,

September 14, 1954

Orel J. Skeen, Warden,
West Virginia Penitentiary,
Moundsville, West Virginia

RE: THE STATE VS. HENRY HINTON FAVORS.

Dear Mr. Skeen:

Referring to your letter of September 10th in regard to the above case.

I am enclosing herewith certified copy of the Indictment and orders in this case. I am unable to furnish you with a copy of the warrant, transcript and certified copies of all testimony taken.

Very truly yours, M. H. Hix, Clerk.

Encl. MHH/mls.

STATE OF WEST VIRGINIA,
Kanawha County, ss.

In the Intermediate Court of Said County:

The Grand Jurors of the State of West Virginia in and for the body of the County of Kanawha and now attending the said Court, upon their oaths present, that Henry Hinton Favors and George Head, Jr., on the — day of August, 1953, in said County of Kanawha, in and upon one Frank Alesci, unlawfully and feloniously did make an assault, on him, the said Frank Alesci unlawfully and feloniously did strike and beat and do violence to his person, and him the said Frank Alesci, in bodily fear feloniously did put, and sixteen

dollars in lawful United States currency of the value of $16.00, a more particular description being to the Grand Jurors unknown, all of the value of $16.00, of the money, goods and chattels of the said Frank Alesci, and lawfully in his control and custody, from the person and against the will of the said Frank Alesci, then there, to-wit; on the day and year aforesaid, in the County aforesaid, unlawfully, feloniously and violently did steal, take and carry away,

* * * * *

against the peace and dignity of the State:

Found at the September Term of said Court, 1953, upon the information of W. W. Fisher, CPD, Charleston,—Sworn in open Court and sent before the Grand Jury to give evidence to that body.

A True Copy, Teste: M. H. Hix, Clerk, Intermediate Court, Kanawha Co., Charleston, W. Va., J. Blackburn Watts, Prosecuting Attorney.

12 (STATE OF WEST VIRGINIA,

At an Intermediate Court for Kanawha County held at the Court House thereof on the 28th day of October, 1953.)
The STATE vs. —— —— On Indictment for Felony. (Rob. by Violence)

No. 340. (with George Head, Jr.)

Henry Hinton Favors.

Henry Hinton Favors, who stands indicted for Felony, was this day set to the bar in the custody of the Sheriff, and the Jury heretofore empaneled and sworn were brought into Court in charge of the Sheriff and his deputies, and having heard the argument of counsel in full, retired to their chamber to consider of their verdict, and after some time returned into Court and upon their oaths do say, "We the Jury find the defendant Henry Hinton Favors, guilty as charged in the indictment. Roy Samms, foreman." And thereupon the Court fixes his punishment to confinement in the Penitentiary of this State for a term of twenty-five years.

Thereupon it was demanded of the said Henry Hinton Favors if anything he had or knew to say why the Court should not now proceed to pronounce the sentence of the law against him, and nothing being offered or alleged in delay of judgement, it is considered by the Court that the defendant, Henry Hinton Favors, be confined in the Penitentiary of this State for a term of twenty-five years, and that the proper officer do, as soon as practicable remove and safely convey the said Henry Hinton Favors from the Jail of this County to the Penitentiary of this State, there to be kept imprisoned and treated in the manner prescribed by law.

The defendant expressing a desire to apply to the Circuit Court of Kanawha County for a writ of error and supersedeas, it is ordered that a stay of the foregoing sentence be granted until the 20th day of January, 1954.

Whereupon the prisoner was remanded to Jail.

13 STATE OF WEST VIRGINIA,
County of Kanawha, ss:

I, M. H. Hix. Clerk of the Intermediate Court for said County and in said State, do hereby certify that the foregoing is a true copy from the records of said Court.

Given under my hand and the seal of said Court this 19th day of January.

M. H. Hix, Clerk, Intermedite Court, Kanawha County, West Virginia. [Seal.]

(STATE OF WEST VIRGINIA:

At an Intermediate Court for Kanawha County held at the Court House thereof on the 27th day of January, 1954.)

The STATE, vs. —— —— ON CONVICTION OF FELONY. (Rob. by Violence)

No. 340. (with George Head, Jr.)

Henry Hinton Favors.

Henry Hinton Favors, who stands convicted of Felony, was this day set to the bar in the custody of the Sheriff.

Whereupon the prisoner was remanded to Jail this day to begin serving the sentence heretofore imposed on him on the 28th day of October, 1953.

STATE OF WEST VIRGINIA,
County of Kanawha, ss:

I, M. H. Hix, Clerk of the Intermediate Court for said County and in said State, do hereby certify that the foregoing is a true copy from the records of said Court.

Given under my hand at the seal of said Court this 19th day of January, 1955.

M. H. Hix, Clerk, Intermedite Court, Kanawha County, West Virginia. [Seal.]

14 PETITIONER'S CERTIFICATION

I, Henry Hinton Favors, the undersigned and petitioner in this case, do hereby swear under oath, below, that the foregoing indictment and orders are true and correct copy as received from the Clerk of the Intermediate Court of Kanawha County; that the foregoing exhibit affidavit statement and letter are true and correct copy; that the "case history and statement of fact" in the foregoing brief is true.

Signed: Henry H. Favors, Petitioner.

Attest: To the Authenticity of the exhibit affidavit statement and letter submitted:

I, an undersigned witness, do hereby swear under oath, below, that I read the original aforesaid affidavit, statement and letter that Henry Hinton Favors, received from George Head, Jr., William L. Lonesome and M. H. Hix, and do hereby testify that the foregoing copies presented herein are true and correct.

Witness: Marland G. Gey.
Witness: Paul Saunders.

STATE OF WEST VIRGINIA,
County of Marshall, ss:

The above petitioner, along with two witnesses, appeared before me, a duly authorized notary public, this date and swore to the truth of the above.

Taken, sworn and subscribed to before me this the 27th day of February 1956, A. D.

My commission expires January 22, 1964, A. D.

R. M. Deegan, Notary Public.

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15 IN THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

HABEAS CORPUS

STATE OF WEST VIRGINIA EX REL. HENRY HINTON FAVORS

vs.

IRA M. COINER, Acting Warden, West Virginia State Penitentiary

WRIT OF HABEAS CORPUS REFUSED—March 5, 1956

On a former day, to-wit, March 3, 1956, came the petitioner, Henry Hinton Favors, in person, and presented to the Court his petition, and exhibits, and affidavits in forma pauperis, praying for a writ of habeas corpus ad subjiciendum to be directed to Ira M. Coiner, Acting Warden, West Virginia State Penitentiary at Moundsville, West Virginia, commanding him to produce the body of Henry Hinton Favors before this Court, and show cause, if any he can, why he detains said petitioner of and from his liberty. Upon consideration whereof the Court is of opinion to and doth refuse the writ prayed for by the petitioner.

A true copy.

Attest: Kenneth E. Hines, Clerk Supreme Court of Appeals.

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16 Clerk's Certificate to foregoing paper omitted in printing.

17 SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1956

No. 20 Misc.

HENRY HINTON FAVORS, Petitioner,

vs.

IRA M. COINER, Acting Warden, West Virginia State Penitentiary

On petition for writ of Certiorari to the Supreme Court of Appeals of the State of West Virginia.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND PETITION FOR WRIT OF CERTIORARI—January 28, 1957

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 719 and placed on the summary calendar.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1957 420888 1013

PETITION NOT PRINTED

Office - Supreme Court, U.S.
FILED
MAR 29 1957
JOHN T. FEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 719

HENRY HINTON FAVORS,
Petitioner,

v.

IRA M. COINER, ACTING WARDEN WEST VIRGINIA PENITENTIARY, MOUNDSVILLE, WEST VIRGINIA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

BRIEF FOR PETITIONER

DAVID GINSBURG,
Counsel for Petitioner.

HARRIET Z. MARGOLIES,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 719

HENRY HINTON FAVORS,

Petitioner,

v.

IRA M. COINER, ACTING WARDEN WEST VIRGINIA PENITENTIARY, MOUNDSVILLE, WEST VIRGINIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

BRIEF FOR PETITIONER

Opinion Below

The order of the Supreme Court of Appeals of the State of West Virginia denying the writ of habeas corpus is set forth in the record (R. 13). The writ was denied without opinion.

Jurisdiction

The order of the Supreme Court of Appeals of the State of West Virginia was entered on March 5, 1956 (R. 13). The petition for a writ of certiorari was filed on May 7, 1956, and granted on January 28, 1957, with leave to proceed *in forma pauperis*. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

Questions Presented

1. In a state court criminal proceeding one attorney was appointed by the court to represent two indigent defendants under a joint indictment: the petitioner, who pleaded not guilty; and a co-defendant who pleaded guilty. The petitioner asked the court for independent counsel and the assigned attorney asked to be relieved, but their requests were denied. While awaiting sentence the co-defendant was called as a witness for the prosecution and testified that petitioner was not implicated. The prosecuting attorney then obtained a recess, removed the co-defendant from the court room and threatened him with life imprisonment if he persisted in exculpating the petitioner. The co-defendant thereupon returned to the stand and implicated the petitioner, who was then convicted and sentenced to twenty-five years in the penitentiary. In these circumstances was the failure of the state to assign independent counsel, free of any conflict of interests, a denial of the due process of law guaranteed by the Fourteenth Amendment?

2. In a state court criminal proceeding a co-defendant, after a plea of guilty and while awaiting sentence, testified as a witness for the state that petitioner was not implicated in the crime. Later, after a recess called by the prosecuting attorney during which the co-defendant was threatened by the prosecution with a sentence not of ten years but of life imprisonment, the co-defendant returned to the court room and implicated the petitioner in the crime. Was the use against petitioner of testimony thus coerced from a co-defendant a denial of the due process of law guaranteed by the Fourteenth Amendment?

3. Do the foregoing procedural defects, taken together, amount to a denial of the due process of law guaranteed by the Fourteenth Amendment?

Constitutional Provisions Involved

Section 1 of the Fourteenth Amendment to the Constitution provides, so far as is material here:

"• • • nor shall any State deprive any person of . . . liberty without due process of law."

Statement

Petitioner, Henry Hinton Favors, began this proceeding on March 3, 1956, by filing a petition for writ of *habeas corpus* in the Supreme Court of Appeals of West Virginia. He was at the time in prison in the State penitentiary at Moundsville, West Virginia, pursuant to a judgment of guilty and a sentence of twenty-five years, entered by the Intermediate Court of Kanawha County, West Virginia (R. 10-11).

His petition and supporting papers[1] showed that the grand jury had returned a joint indictment against petitioner and one George Head, Jr., on a charge of robbery of sixteen dollars ($16.00) by violence (R. 9-10). The judge of the Intermediate Court of Kanawha County appointed W. L. Lonesome, Esq., as counsel to represent both petitioner and his co-defendant Head (R. 8). On the advice of Mr. Lonesome that a plea of guilty would result in the minimum ten year sentence (the maximum sentence being life imprisonment), Head pleaded guilty; petitioner refused to plead guilty, and stood trial (R. 2).

The *habeas corpus* petition further alleges that Mr. Lonesome, realizing the conflict of pleas, sought to withdraw as counsel for petitioner but was denied permission to do so by the court. Petitioner himself also objected to the arrangement in open court, and asked the judge to appoint other counsel. The judge thereupon called the

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[1] As shown by the record (R. 12-13) petitioner followed the usual practice in *habeas corpus* proceedings of filing typed copies of the documents supporting his petition, certified by himself and two witnesses, under oath, to be true copies of the originals. The typed copy of Head's affidavit (R. 6-7) failed to show that it was executed. The files of this Court contain a photostatic copy of the original which shows that it was executed before a notary public on January 27, 1955. This photostatic copy was sent forward by petitioner on December 31, 1956, in further support of his petition for certiorari.

prosecuting attorney, Mr. Lonesome and the petitioner to a conference. Petitioner repeated his request for the appointment of another counsel but the judge stated: "I appointed Mr. Lonesome to represent you both in this case. The Court hasn't time to appoint you another counsel; that the dockets must be cleared without interruption" (R. 2).

Co-defendant Head who had pleaded guilty and was awaiting sentence in the county jail was called as a witness for the State. Head testified on direct examination that petitioner was not with him when the crime was committed. The prosecuting attorney thereupon sought and obtained a fifteen minute recess, removed Head from the courtroom to his office, and there threatened Head with a life sentence if he did not change his testimony and swear that petitioner was with him (R. 3, 6-8). Following the recess, Head returned to the stand and so testified (R. 3). Head was later sentenced to ten years imprisonment on his plea of guilty (R. 4).

The petition for the writ of *habeas corpus* was filed on March 3, 1956; two days later, on March 5, the Supreme Court of Appeals, without hearing or opinion, denied the writ (R. 13).

ARGUMENT

I

When the Writ of Habeas Corpus Is Denied Without Return and Without a Hearing, Facts Alleged in Petition and Supporting Documents Are to Be Taken as True for Purposes of Determining Whether Proceedings Were Void for Lack of Due Process.

Petitioner complains that he is deprived of his liberty without due process of law and the facts stated in his petition for the writ of *habeas corpus* and supporting documents fairly tender the issue. He complains that at his

trial he was represented, over his protest, by counsel appointed by the court to represent both petitioner, who pleaded not guilty and stood trial, and a co-defendant who pleaded guilty and was awaiting sentence at the time that he was called as a witness for the prosecution and testified against the petitioner. He complains further that the testimony of his co-defendant, on the basis of which he was convicted, was perjured, and was coerced by a threat of life imprisonment.

The Supreme Court of Appeals of West Virginia denied the writ without calling for a return. Petitioner was thereby denied an opportunity to prove his allegations, none of which were inconsistent with the recitals of the certified copies of indictment, sentence and other official documents accompanying the petition.

In this posture of a *habeas corpus* or other procedure to test the legality of a proceeding as a result of which a petitioner has been deprived of his liberty, this Court has consistently held that the facts alleged are to be taken as true for purposes of determining whether petitioner is held pursuant to a court judgment rendered in violation of Federally protected rights. *Smith* v. *O'Grady*, 312 U.S. 329 (1941); *Williams* v. *Kaiser*, 323 U.S. 471 (1945); *House* v. *Mayo*, 324 U.S. 42 (1945). The question therefore is whether the facts alleged show that petitioner was deprived of rights guaranteed by the Fourteenth Amendment. If so, the denial of the writ, which denied petitioner an opportunity to prove his allegations, was error.

II

A State Which Provides Counsel as One of the Procedural Rights by Which It Insures the Fair Trial Guaranteed by the Fourteenth Amendment Cannot Lawfully Deny the Substance of That Right by Appointing Counsel Precluded by a Conflict of Interest from Giving Effective Assistance.

A. *Assistance of Counsel is one of the complex of procedural rights by which West Virginia has chosen to insure a fair trial in criminal proceedings.*

The statutes of West Virginia provide that "The accused shall be allowed counsel in a felony case, and if he desire it, in a misdemeanor case to assist him in his defense". West Virginia Code (1955), Chap. 62, Art. 3, Sec. 6190. Rule IV (a) promulgated by the Supreme Court of Appeals of West Virginia, requires that "After indictments have been returned by the grand jury, if the defendant has no counsel, nor means to employ one, the court shall assign counsel." Rules of Practice for Trial Courts, West Virginia Code (1955), Appendix. The Supreme Court of Appeals of West Virginia has defined the right guaranteed by West Virginia law as "the right of a defendant to call for or demand counsel, and to have counsel act pursuant to the call or demand, whether the demand is made before or after entry of a plea." *Wade* v. *Skeen*, —— W. Va. ——, 85 S.E. 2d 845 (1955).

Under the decisions of this Court, West Virginia was not required by the Fourteenth Amendment to accord this broad right to counsel to defendants in its courts. *Betts* v. *Brady*, 316 U.S. 455 (1942). It was free to adopt such alternative and different procedures as it saw fit to insure the "fair trial" guaranteed by the due process clause of the Fourteenth Amendment. It has not done so.

By its own law and its own procedure, West Virginia has chosen to carry out its obligations under the due process

clause by making assistance of counsel part of the state's system for guaranteeing a fair trial.

Thus, the initial Constitutional question raised in this case is whether the state having elected to make the assistance of counsel a part of its machinery for insuring the fair trial guaranteed by the Fourteenth Amendment, can, consistently with due process, deny the substance of assistance of counsel by requiring the accused to accept counsel appointed in such circumstances as preclude the full and vigorous representation essential for the protection of a criminal defendant.

This case also raises a related but narrower issue: whether a state which uses tactics to secure a conviction so fundamentally unfair as to give rise to a duty to provide counsel under the Fourteenth Amendment, discharges that duty by appointing counsel subject to such conflict of interest as precludes his giving effective aid.

B. *Petitioner was denied the substance of the right to assistance of counsel.*

In the case at bar, one attorney was appointed to represent both petitioner and a co-defendant, George Head, Jr. (R. 8). After conferring with this attorney, who advised them that a plea of guilty would probably result in the minimum sentence permissible under the statute (ten years) Head decided to plead guilty (R. 2). Petitioner refused to plead guilty, and during his trial Head, who was awaiting sentence on his plea, testified as a witness for the prosecution that petitioner was implicated in the crime (R. 2-3, 7-8). The conflict of interests that thus developed between petitioner and Head is clear. As the Circuit Court of Appeals in *Hayman* v. *United States*, 187 F. 2d 456, 459 (CCA 9th, 1950) reversed on other grounds, *United States* v. *Hayman*, 342 U.S. 205 (1952), pointed out, petitioner's attorney was in no position to argue that "my convicted client [Head], for whom I am soon to plead

for an amelioration of his sentence, is a monumental liar seeking to convict my honest and innocent client [Favors]."

In holding that such a conflict of interest denies the assistance of counsel guaranteed by the Sixth Amendment, this Court pointed out in *Glasser* v. *United States*, 315 U.S. 60, 70 (1942) that assistance of counsel means assistance "untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests."

In *Hayman* v. *United States, supra*, Hayman alleged that his attorney, without Hayman's knowledge, was also attorney for one Juanita Jackson, who appeared as a Government witness against Hayman, at a time when she was awaiting sentence on a plea of guilty to violating the same statute as appellant.

The Circuit Court of Appeals, following *Glasser*, found that on the facts alleged, Hayman had been denied the effective assistance of counsel. On *certiorari*, this Court did not disturb the concurrent findings of both courts below that Hayman's motion stated grounds to support a collateral attack on his sentence, and raised substantial issues of fact calling for an inquiry into their verity. *United States* v. *Hayman, supra*, 342 U.S. at 210.

If under the facts of *Hayman* and *Glasser*, defendant was denied the effective assistance of counsel, petitioner here was *a fortiori* denied such assistance. In the case at bar, counsel for petitioner had advised his other client, Head, based on his knowledge of local practice, that a plea of guilty would result in a ten-year sentence, the minimum permissible under the West Virginia statute. Head, in reliance on this representation, pleaded guilty. As it developed, Head's own plea of guilty was insufficient; Head must also incriminate Favors to win for himself the minimum sentence (R. 3, 6-7). Where lay counsel's duty now? Was it to protect his client Head who had acted in reliance on his advice? Was it to attempt to under-

mine Head's testimony as perjured? Was it to advance Head as a cooperative witness deserving of the favorable exercise of the Court's discretion? Was it to protect Favors?

The answer is that given by this Court in the *Glasser* case: under our system of jurisprudence, a defendant is denied the assistance of counsel when "in behalf of one client, it is [counsel's] duty to contend for that which duty to another client requires him to oppose."[2] We believe that assistance of counsel was denied in this case by maintaining counsel assigned to represent co-defendants over the objection of accused after the existence of a conflict became manifest; and by retaining Lonesome as petitioner's counsel when the inculpatory testimony of Attorney Lonesome's other client was introduced. At that point if not before, Lonesome became disqualified as petitioner's attorney, and petitioner, in effect, had none. *Wright* v. *Johnston*, 77 F. Supp. 687, 693 (N.D. Cal., 1948).

C. *If the right to counsel is one of the rights by which a state insures the fair trial guaranteed by the Fourteenth Amendment, the State must provide counsel free of any disabling conflict of interest.*

Broadly stated, the issue in this case is whether, if a defendant's procedural rights under state law include the right to counsel, the due process clause of the Fourteenth Amendment requires that the counsel appointed by the state meet the kind of standards established by this Court in *Glasser* v. *United States, supra.*

Respondent suggests that since petitioner had no Federally protected right to counsel, he cannot be heard to complain that he was denied effective assistance of counsel. We concede that under the decisions of this Court, the right to appointed counsel under the Fourteenth Amend-

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[2] The definition of conflict of interest given in Canon 6 of the Canons of Professional Ethics of the American Bar Association.

ment is not co-extensive with the right to appointed counsel under the Sixth Amendment. *Betts* v. *Brady*, 316 U.S. 455 (1942); *Bute* v. *Illinois*, 333 U.S. 640 (1948). But even if it were assumed that the state had no duty to provide counsel in this case under the Fourteenth Amendment, this fact would provide no rational basis for the conclusion that the state was free to appoint counsel barred by circumstances inherent in the case from giving effective aid. Thus, this Court has held that an indictment or presentment by a grand jury is not essential to due process of law. *Hurtado* v. *California*, 110 U.S. 516 (1884). *But if the grand jury is retained, it must be fairly constituted. Norris* v. *Alabama*, 294 U.S. 587 (1935). In other words, the fact that there may be no Federally protected right to assistance of counsel does not prove that there is no Federally protected right to effective assistance of counsel if the state elects to provide counsel.

We believe, and we urge this Court to hold, that if a state elects to appoint counsel for a defendant, it assumes the obligation, under the Fourteenth Amendment, to appoint counsel satisfying standards for assistance of counsel which reasonably approximate those established in the *Glasser* case. We believe, moreover, that the cases decided by this Court, support and demand this result.

First, where a state court is required by the due process clause of the Fourteenth Amendment to provide counsel in a criminal case, the decisions of this Court make it entirely clear that the duty to appoint is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid. *Powell* v. *Alabama*, 287 U.S. 45, 71 (1932); *Hawk* v. *Olson*, 326 U.S. 271 (1945). No basis in law or logic can be found to support the view that it makes a difference under the Fourteenth Amendment whether the duty to appoint counsel is imposed directly by the Fourteenth Amendment, or self-imposed by the state in partial fulfillment of its duty under the Fourteenth Amendment to give the accused a fair trial.

Second, *Glasser* v. *United States, supra,* recognized the principle that freedom from conflict of interest is of the very essence of assistance of counsel. In that case this Court refused to weigh the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Glasser's counsel to represent his co-defendant. "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial . . . Of equal importance with the duty of the court to see that an accused has the assistance of counsel is its duty to refrain from embarrassing counsel in the defense of an accused by insisting, or indeed, even suggesting that counsel undertake to concurrently represent interests which might diverge from those of his first client, when the possibility of that divergence is brought home to the court." *Glasser* v. *United States, supra,* 315 U.S. at 76.

As the court pointed out in *Wright* v. *Johnston, supra,* 77 F. Supp. at 693, no divergence of interest more clearly could have been "brought home to the court" than did the inculpatory testimony against petitioner of Attorney Lonesome's other client Head. At the moment of its introduction in evidence, Lonesome became disqualified as petitioner's attorney and he, in effect, had none.

Finally, although a majority of this Court has been unwilling to hold that an unqualified right to counsel is guaranteed by the Fourteenth Amendment, the tendency of its teachings in the right to counsel cases is to point the way toward the voluntary adoption by the states of a Sixth Amendment view of the right to counsel.[3] This tendency is

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[3] *Cf.* Beaney, *The Right to Counsel in American Courts* (1955), at p. 139: "It is suggested that under pressure exerted by United States Supreme Court decisions that have already been handed down, and by those future ones which will follow the principles now established, the states will inevitably be forced to adopt measures concerning counsel for state trials which will eventually approximate in practice the right in federal trials under the Sixth Amendment provision. In self-defense,

vividly illustrated by the fact that in its May Term 1948 the Supreme Court of Illinois promulgated a rule requiring the trial court "before receiving . . . any plea to an indictment . . . [to] advise [the defendant] that he has a right to be defended by counsel." Supreme Court Rule 26(a), Smith-Hurd Illinois Annotated Statutes, Ch. 110, Practice §101.26(2). This was within a matter of weeks after this Court expressly held in *Bute* v. *Illinois, supra,* decided on April 19, 1948, that Illinois was under no Constitutional duty to provide counsel, and therefore under no Constitutional duty to advise a defendant of his right to counsel under Illinois law before accepting a plea of guilty in a felony case.

The day will come, we believe, when the states will recognize, and this Court will say that the right to counsel is "of the very essence of a scheme of ordered liberty." *Palko* v. *Connecticut,* 302 U.S. 319, 325 (1937). That day has not yet come. But it is not premature to ask this Court now to decide that if a state elects to provide counsel as an integral part of its system for insuring the fair trial guaranteed by the Fourteenth Amendment, it cannot lawfully deny the very essence of that right to an accused who stands before its bar of justice.

The duty of undivided fidelity is enjoined on all members of the bar. This principle is so deeply woven into the fabric of our common law system as to bar counsel from appearing for both sides in an ordinary contract case. Surely, then, this Court must hold that simultaneous representation of conflicting interests renders criminal proceedings "so apt to result in injustice as to be fundamentally unfair"

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states like Michigan and Illinois have taken action after adverse Supreme Court decisions. While states such as Alabama, Florida, and Maryland may move more slowly and less willingly, recent decisions in these states nonetheless reflect the influence of the United States Supreme Court decisions."

within the rule of *Uveges* v. *Pennsylvania*, 335 U.S. 437, 441 (1948).

III

In This Case the Gravity of the Crime and the Conduct of the Prosecuting Officers Rendered Independent Counsel Essential to a Fair Trial.

In analyzing the decisions of this Court in the "right to counsel" cases under the Fourteenth Amendment, Mr. Justice Reed said:

> Some members of the Court think that where serious offenses are charged, failure of a court to offer counsel in state criminal trials deprives an accused of rights under the Fourteenth Amendment. They are convinced that the services of counsel to protect the accused are guaranteed by the Constitution in every such instance. See *Bute* v. *Illinois*, 333 U.S. 640, dissent, 677-79. Only when the accused refuses counsel with an understanding of his rights can the court dispense with counsel. Others of us think that when a crime subject to capital punishment is not involved, each case depends on its own facts. See *Betts* v. *Brady*, 316 U.S. 455, 462. Where the gravity of the crime and other factors—such as the age and education of the defendant, the conduct of the court or the prosecuting officers, and the complicated nature of the offense charged and the possible defenses thereto—render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair, the latter group holds that the accused must have legal assistance under the Amendment whether he pleads guilty or elects to stand trial, whether he requests counsel or not. Only a waiver of counsel, understandingly made, justifies trial without counsel.

Uveges v. *Pennsylvania, supra,* 335 U.S. at 440-441. (Footnote numbers omitted).

In the case by case approach thus adopted, it is the need for counsel in a particular case that generates a Federally protected right to counsel. Cf. dissenting opinion, *Bute* v. *Illinois, supra,* 333 U.S. at 682.

We submit that the *need for counsel* is demonstrated by the record here. At a minimum the state was guilty of overreaching in the tactics used to extract from the witness Head his incriminating testimony.[4] Head was on the stand. He testified under oath that petitioner was not with him when the robbery was committed, and persisted in this testimony against all efforts to make him change his testimony in open court. He was withdrawn from the stand, taken from the courtroom and conferred privately with the prosecuting attorney. Head states that he was threatened with life imprisonment if he did not get back on the stand and implicate Favors in the crime.

Respondent suggests that this is not true. (Resp. Supp. to Br. in Opposition, p. 4). But if all that was wanted, as respondent suggests, was to admonish the witness to tell the truth, *this could have been done in open court.* The fact that it was necessary to withdraw Head from the stand, supports, if it does not demand, the inference that what was said to Head in the interval was something that *could not* be said in open court. We submit that this is the only inference that can logically be drawn from the sequence of events at the trial. Perhaps, on trial of the issue of fact, the officers of the state could persuade the trier of facts that there was another explanation for the necessity for conferring with Head out of hearing of the court. We are unable to suggest what that explanation might be, and since the writ of *habeas corpus* was denied without requir-

[4] For Constitutional aspects of the use of this coerced testimony, see Section IV *infra.*

ing the respondent to show cause, if he could, why petitioner was lawfully detained, we must assume that Head accurately describes what took place during the recess.

On this assumption, as pointed out above, the prosecuting officers were, at a minimum, fundamentally unfair in the tactics used to induce Head to repudiate his earlier testimony and incriminate Favors. Such fundamentally unfair conduct—such overreaching on the part of the State—this Court has said in analagous situations, establishes the need for counsel which, in turn, establishes a Federally protected right to counsel. Cf. *Townsend* v. *Burke*, 334 U.S. 736 (1948); *DeMeerleer* v. *Michigan*, 329 U.S. 663 (1947); *Smith* v. *O'Grady*, 312 U.S. 329 (1941).

A Fourteenth Amendment right to counsel having been shown, the further question of whether the duty to provide counsel was adequately discharged can be examined by this Court, as it was in *Powell* v. *Alabama*, *supra*, and *Hawk* v. *Olson*, *supra*, in both of which the state had in fact appointed counsel to represent the defendants. In these cases, it was chiefly the necessity for time to prepare a defense that was in issue, and this Court held that the duty to provide counsel was not discharged by appointment of counsel at such time and in such circumstances as to preclude the giving of effective assistance.

Here, another facet of effective assistance of counsel is in issue; but the thrust of the argument is the same. The circumstances that made effective assistance impossible were created by the state in appointing one counsel to represent co-defendants with conflicting interests. They were compounded by the state by its use of unfair tactics to force one of the defendants to incriminate the other. Finally, the very fact that counsel had been appointed for petitioner relieved both the judge and the prosecuting attorney of the higher degree of obligation they would otherwise have borne to insure that defendant had a fair trial. A state does not discharge its duty to appoint counsel

by appointment *in such circumstances* as to preclude the giving of effective aid. *Powell* v. *Alabama, supra,* 287 U.S. at 71.

IV

A Conviction Obtained on the Basis of Perjured Testimony Coerced from a Defendant Witness by Threat of Life Imprisonment in Order to Incriminate His Co-Defendant Is a Denial of Due Process of Law, Whether or Not the State Knew That the Testimony Was Perjured.

In *Mooney* v. *Holohan,* 294 U.S. 103, 112-113 (1935) this Court declared that the requirements of due process are not met "if a state has contrived a conviction through the pretence of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. And the action of prosecuting officers on behalf of the State, like that of administrative officers in the execution of its laws, may constitute state action within the purview of the Fourteenth Amendment." (Underscoring supplied.)

The rule of *Mooney* v. *Holohan, supra,* does not make the use of perjured testimony alone the test; it is the use of testimony known to be perjured. Respondent suggests that Head may have told several stories (Resp. Supp. Br. in Opposition, p. 4). Relying on the presumption of regularity, the argument continues, and in the absence of a specific allegation of fact to the contrary, the Supreme Court of Appeals was entitled to find that the prosecuting attorney did not "know" that the second testimony was perjured.

Petitioner is a pauper and in prison. He asked for a copy of the transcript. It was denied him (R. 9).[5] We are advised that the procedures of West Virginia provide no means by which a poor person unable to pay for the transcript can obtain a copy for use in connection with *habeas corpus* proceedings. Such means as were available for showing probable cause that the prosecuting attorney knew that Head's second testimony was perjured, were thus, as a practical matter, beyond the reach of petitioner.

As counsel appointed by this Court to represent petitioner, we obtained certified copies of the transcript which we have filed with the Clerk of this Court. The entire testimony of the witness Head at the trial is set forth in the Appendix to this brief. We submit that it shows that the prosecuting attorney probably did *not* believe that Head's second testimony was true. He made no effort to elicit from Head any details of Favors' alleged participation in the crime; he did not inquire how and when the men had met to plan the robbery; he did not ask what Favors' part in it had been; he did not seek to learn what they had done after the robbery. None of this was brought out through Head's testimony.

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[5] Petitioner not having the benefit of counsel did not specifically complain of the denial of the transcript in the court below, nor does it appear, as the case now stands, that a transcript is a procedural requirement or otherwise essential to the successful prosecution of a *habeas corpus* proceeding under West Virginia law. The reason is that all but one of the important elements of the petition for *habeas corpus* can be established by affidavits or other evidence outside the transcript of the trial; the single issue on which the transcript may be essential is the issue of knowledge on the part of the State under the *Mooney* case. Accordingly, the Constitutional question of whether the Equal Protection Clause of the Fourteenth Amendment requires the state to provide a transcript is not squarely raised on this record. But if this Court holds that knowledge by the state that the testimony was perjured is essential to show deprivation of a Constitutional right, and if such knowledge can be proved only by inferences fairly drawn from the conduct of the prosecuting officers at the trial, then the writ should issue on an allegation of knowledge, and on the trial of the issue of fact, the petitioner would have a Constitutional right to a transcript. *Griffin* v. *Illinois*, 351 U.S. 12 (1956).

We suggest that this failure to bring out any of the circumstances, this decision to rest on the bare statement by Head that Favors was with him when the robbery was committed, could well persuade a trier of facts (1) that the prosecuting attorney felt that he could not rely on Head to remember whatever "facts" were recited in his previous statement to the police, because he suspected that these "facts" were or might have been a fabrication; and (2) that the prosecuting attorney "knew" within the meaning of the *Mooney* case, that Head's second testimony was perjured, unless the prosecuting attorney, on trial of the issue of fact raised by petitioner, was able to explain to the satisfaction of the fact finder why he had omitted to pursue the questioning. The transcript shows that the state was either aware that Head's testimony was untrue or indifferent to whether the testimony wrung from him was true or false.

But we believe that the record before the Supreme Court of Appeals of West Virginia, without reference to the transcript, shows probable cause to believe that the proceedings were void for lack of due process. The petition and supporting papers, without more, show that Head's second testimony incriminating petitioner was coerced by a threat of life imprisonment. The Constitutional question mooted but not decided in *Turner* v. *Pennsylvania*, 338 U.S. 62, 65-66 (1949), is thus squarely raised by the record in the case at bar: "whether under the Fourteenth Amendment a coerced statment may be excluded on objection of one not coerced into making it." See also *Ashcraft* v. *Tennessee*, 322 U.S. 143 (1944).[6]

To this question, we submit, there can be only one answer under the common law system of jurisprudence.

In a long line of cases, beginning with *Brown* v. *Mississippi*, 297 U.S. 278 (1936), this Court has held that confes-

[6] We emphasize that only the Fourteenth Amendment question is open. In the context of a Federal criminal proceeding, this Court reversed the convictions of two defendants where it appeared that these convictions rested principally on pre-trial statements coerced from their co-defendants. *Anderson* v. *United States*, 318 U.S. 350 (1943).

sions obtained by force cannot be used in state proceedings as the basis for conviction and sentence. These decisions rest not on the presumption that the forced confession is false; nor on the theory that use of force is in itself a violation of a Federally protected right; nor on a Federally protected privilege against self-incrimination. They rest squarely on the premise that a confession extorted from the accused has no probative value on the issue of guilt or innocence, and its introduction in evidence, against the defendant, therefore, infringes his Federally protected right to due process of law. As this Court said in *Lyons* v. *Oklahoma*, 322 U.S. 596, 605 (1944):

> "A coerced confession is offensive to basic standards of justice, not because the victim has a legal grievance against the police, but because declarations procured by torture are not premises from which a civilized forum will infer guilt."

This is the core of the second due process question before the Court in the case at bar. Was Head's second statement repudiating his first and incriminating petitioner, a premise from which a civilized forum would infer guilt? Head had pleaded guilty, and was awaiting sentence. The penalty for robbery by violence under Chapter 61, Article 2, Section 5927 of the West Virginia Code is a minimum of ten years. By decision of the Supreme Court of Appeals of West Virginia the penalty authorized by this language runs from ten years to life. *State* v. *Newman*, 108 W. Va. 642, 647; 152 S. E. 195, 197 (1930). The state was thus in a position to carry out its threat that unless Head changed his story, he would, or might, spend the rest of his life in the penitentiary. Testimony so coerced, as Mr. Justice Rutledge has said, is "unworthy of credence in any court." *Malinski* v. *New York*, 324 U.S. 401, 422 (1945). In the *Malinski* case, the Court held that Malinski's confession was coerced, and its admission was therefore a violation of due process as to Malinski. Malinski's confession impli-

cated his codefendant Rudish. The majority found it unnecessary to determine the Constitutional question as to Rudish because the case against Rudish, both as tried and as sustained on review, in the state courts, was not dependent on Malinski's confession. Justices Rutledge and Murphy, however, felt that the safeguards adopted by the state to prevent prejudice to Rudish were not sufficient. On the Constitutional issue thus reached, Mr. Justice Rutledge said:

> "Due process does not permit one to be convicted upon his own coerced confession. It should not allow him to be convicted upon a confession wrung from another by coercion. A conviction supported only by such a confession could be but a variation of trial by ordeal." 324 U.S. at 430-431.

As this Court said, in *Lisenba* v. *California*, 314 U.S. 219, 236 (1941), "the aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false". Under this criterion it is irrelevant, we submit, whether the state knows that coerced testimony is false. It is against a fundamentally unfair means of inducing testimony that due process guards the accused, not against false testimony. It is not that the state believes the testimony to be false that is the ultimate test of due process; it is that the state knows, by reason of the means used to compel it, that the testimony is "not a premise from which a civilized forum will infer guilt".

Due process cannot prevent the bearing of false witness; it can prevent, and we ask this Court to say that it does prevent, the use by the state of threats, intimidation, coercion, or bribery to induce anyone to bear witness to a particular fact.

V

On the Basis of the Record as a Whole, in the Appointment by the Court of Counsel Subject to Conflicting Interests and in the Use by the Prosecution of Coerced Testimony, Petitioner Was Denied a Fair Trial.

In his petition for *habeas corpus*, Henry Hinton Favors, an imprisoned pauper, without benefit of counsel, set forth the facts as he saw them, with such supporting evidence as he was able to gather. He did not ask the Supreme Court of Appeals of the State of West Virginia to find on the basis of his petition that the facts he alleged were true. He asked the court to read his petition, and to decide whether if the facts he alleged were true, he had been given the fair trial guaranteed by the Constitution of the United States. He now asks this Court to read his petition, and to determine the ultimate Constitutional issue of fair trial on all the facts.

For convenience we have considered the two Constitutional issues separately. Either, we believe, is sufficient, standing alone, to require reversal. But lest an arrangement useful for analysis and argument obscure the reality and singleness of the issue, we ask the Court to remember that there was but one trial, and it is the fairness of that trial as a whole that is here for review. The procedural defects of the proceedings below can perhaps be separated for purposes of discussion; but in the record before this Court they coalesce into a whole that calls for redress.

The liberty of Henry Hinton Favors, client of William Lonesome and petitioner before this Court, was in the balance when George Head returned to the stand after a recess during which he had conferred with the prosecuting attorney. The victim had refused to identify Favors as the second man involved in the robbery (R. 2).[7] Head had

[7] Petitioner apparently thought that by saying that Alesci, the victim, could not identify him, he was sufficiently making the point that Head's

denied, under oath, that Favors was with him when the crime was committed. He had not only denied it, he had persisted in denying it, and resisted all efforts in open court to make him say that Favors was the second man. The transcript continues:

> "A short recess was then taken after which the examination was resumed as follows:
>
> "Q. George, did Henry Favors go with you that night to rob Frank Alesci and Tony Franklin?
>
> A. Yes, sir." (Tr. p. 31; App. to Br., p. 29)

At this crucial point of the trial the State of West Virginia says that petitioner could be fairly represented by George Head's attorney. We say he could not. Unless the members of this Court forget as judges what they knew as lawyers, they know it was not only petitioner's liberty that hung in the balance; George Head's fate was also at stake. George Head had a vital interest in assuring that the restriction on his liberty be kept to the minimum (ten year) sentence; that interest Head's lawyer was ethically and morally bound to safeguard. George Head was not vigorously pressed on cross-examination by his own (and Favors') counsel. He was not forced to explain the circumstances which led him to change his testimony. George Head was given his minimum ten-year sentence.

On this record Henry Hinton Favors, indicted for the robbery of sixteen dollars ($16.00) by violence, defended by William Lonesome, was jailed for twenty-five years, convicted on the testmony of George Head, also defended by William Lonesome, exacted by threat of life imprisonment.

This is not due process of law.

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was the only testimony that identified petitioner with the robbery. The transcript of the trial shows that Head's testimony was in fact uncorroborated.

VI

No Independent State Ground Exists Which Would Support the Judgment Below

The Supreme Court of Appeals of West Virginia denied the petition for *habeas corpus* without opinion. The petition alleged that petitioner was restrained of his liberty, and alleged facts concerning his trial which fairly raised the issue of whether the proceedings, as a result of which petitioner was deprived of his liberty, were void because they violated the due process of law clause of the Fourteenth Amendment.

Under the Constitution and Statutes of West Virginia, *habeas corpus* is the proper procedure by which to attack a judgment on the ground that it is void. In *Dye* v. *Skeen*, 135 W. Va. 90, 62 S.E. 2d 681 (1950), the Supreme Court of Appeals of West Virginia considered whether the validity of a judgment of life imprisonment, imposed under the habitual criminal statute then in force, can be inquired into and attacked in a *habeas corpus* proceeding. The court stated:

> "A writ of habeas corpus is not a substitute for a writ of error or other appellate process, and does not reach irregularities in the proceedings or errors in the judgment of a court which has jurisdiction of the parties and of the subject matter in a civil or a criminal proceeding . . . When the process or the proceeding is void, however, the remedy by habeas corpus may be invoked. *State ex rel. Nutter* v. *Mace*, 130 W. Va. 676, 44 S.E. 2d 851; *Ex parte Page*, 77 W. Va. 467, 87 S.E. 849; *Ex parte Bornee*, 76 W. Va. 360, 85 S.E. 529, L.R.A. 1915 F, 1093; *Ex parte Evans*, 42 W. Va. 242, 24 S.E. 888; *Ex parte Mooney*, 26 W. Va. 36, 53 Am. Rep. 59.
>
> "In the last cited case of *Ex parte Mooney*, in affirming the order of the circuit court which dismissed a writ

of habeas corpus and remanded the prisoner, the Court discussed some of the general principles which govern courts in habeas corpus proceedings and in the opinion said:

"'A proceeding defective for *irregularity* and also one void for *illegality* may be reversed upon error or *certiorari;* but it is the latter defect only which gives authority to discharge on *habeas corpus.*'"

The allegation that the state proceedings that resulted in deprivation of liberty denied the defendant due process of law is an allegation not of mere irregularity but of illegality. Under West Virginia law this illegality may be tested directly on appeal or collaterally by *habeas corpus.*

It is suggested on behalf of respondent (Res. Br. in Opposition to Certiorari, pp. 4-5) that the petition for the writ may have been denied because petitioner failed to meet the requirements of Chapter 53, Article 4, Section 5324 of the Code of West Virginia, governing issuance of the writ of *habeas corpus,* which requires that application be made by "petition, showing by affidavit or other evidence probable cause to believe that he is detained without lawful authority."

By his own affidavit (R. 12) petitioner verified all the facts alleged in his petition. The one vital fact alleged in his petition, that petitioner could not have known of his own knowledge, was that Head, his co-defendant, changed his testimony by reason of the threat of life imprisonment made to him during the recess granted to the prosecution after Head had testified that petitioner was not with him at the time the crime was committed. This fact is verified by Head's affidavit (R. 6-7). The fact that the same attorney was appointed to represent both Head and petitioner at petitioner's trial is confirmed by the letter dated November 4, 1955, from William L. Lonesome (R. 7-8), who is a member of the West Virginia Bar. Mr. Lonesome also confirms that Head first testified that petitioner was not

with him when the robbery of which he was convicted took place; that the prosecuting attorney requested a recess, took Head off the stand and talked to him; that Head thereupon returned to the stand and testified that petitioner was with him at the time the crime was committed.

Respondent suggests that the allegations by petitioner in a verified petition are insufficient under West Virginia law. (Resp. Br. in Opposition, p. 5). Respondent cites no case in support of this position. The rule as stated in Michie's Jurisprudence of Virginia and West Virginia is flatly contrary:

> "A person who is in custody and applies for a habeas corpus may show by his own affidavit probable cause to believe that he is detained in custody without lawful authority. The affidavit by the applicant is sufficient to institute the proceedings, although such applicant may be a disqualified witness, as by reason of conviction of an infamous offense, etc., just as an affidavit of such person is sufficient on the application for an injunction, or a continuance, etc." Michie's Jurisprudence, v. 9 Habeas Corpus, sec. 20.

The case cited in support of this rule is *DeLacy* v. *Antoine*, 7 Leigh (Virginia) 438, decided by the Court of Appeals of Virginia in 1836 under a statute containing the identical requirement that applicant "shew, by affidavit or other evidence, probable cause to believe that he is detained in custody without lawful authority." Revised Code of Virginia (1819), ch. 120, Vol. 1, p. 468. The rule of *DeLacy* v. *Antoine*, decided while West Virginia was still part of Virginia, has never been reversed or drawn into question by the Supreme Court of Appeals of West Virginia.

The State of West Virginia is surely not asking this Court to say that if the document sworn to had been called an Affidavit it would have been acceptable but since it was called a Petition it cannot be regarded as an "affidavit or other evidence" even though sworn to. It cannot be sup-

posed that West Virginia found petitioner's claim of denial of Constitutional right valid on the merits yet denied the writ because petitioner had failed to caption his document properly—and did so without giving petitioner an opportunity to correct the caption in order to safeguard his Constitutional rights.

The distinction for this purpose between a verified petition and an affidavit is one of nomenclature not substance; both documents set forth facts or other data under oath. In any event, the writ issues under West Virginia law when the probability of unlawful detention is shown "by affidavit or other evidence." The verified petition, Head's affidavit and Lonesome's letter surely satisfy the statutory requirement of "other evidence." If they do not then West Virginia casts an impossible burden on a person claiming to be unlawfully imprisoned, who is wholly without power to compel anyone to furnish affidavits in his behalf; in effect, it would deny the possibility of collateral attack on a judgment alleged to be unlawful.

Conclusion

The judgment of the Supreme Court of Appeals of West Virginia denying the writ of *habeas corpus* should be reversed, and the cause remanded to that court for further proceedings.

Respectfully submitted,

DAVID GINSBURG,
Counsel for Petitioner.

HARRIET Z. MARGOLIES,
Of Counsel.

MARCH 29, 1957.

APPENDIX

Excerpt from the Transcript of Proceedings in the Intermediate Court of Kanawha County, West Virginia, pp. 28-34, setting forth all the testimony of George Head, Jr., at the trial of petitioner. A certified copy of the entire Transcript has been filed with this Court.

GEORGE HEAD, JR., having been first duly sworn as a witness, testified as follows:

Direct examination.

By Mr. Bryan:

Q. Give the Court and Jury your name.
A. George Head, Jr.
Q. How old are you?
A. Nineteen.
Q. Where is your home?
A. Carbon, West Virginia.
Q. In Kanawha County?
A. Yes, sir.
Q. Up on Cabin Creek?
A. Yes, sir.
Q. Do you have a sister, George?
A. Yes, sir.
Q. What is her name?
A. Frances Jones.
Q. How old is Frances?
A. She is twenty.
Q. Do you know Henry Hinton Favors, sitting at the Counsel table here?
A. Yes, sir.
Q. How long have you known Henry?
A. I have knowed him about three or four days before I got in jail.

Q. How did you happen to meet him?

A. When he first came, he came up to the hotel where I was working at.

Q. Where did you work?

A. The Ruffner Hotel.

Q. Did your sister know him before that, before you did?

A. Yes, sir, I think so.

Q. George, have you been out in the back end of town and do you know where Frank Alesci and Tony Franklin had the shoe shop?

A. Yes, I know where they stayed.

Q. How long had you known about that shoe shop?

A. I didn't know about it long. I had my shoes fixed there once.

Q. Did you and the defendant, Henry Favors, discuss going out and robbing these two fellows?

A. There was another guy with us.

Q. What was his name?

A. John Smith.

Q. Where did you meet John Smith?

A. I met him up in the District of Columbia when I was in the Army.

Q. How long had you known John?

A. About six or seven months.

Q. John Smith and Henry Favors were with you when you were there?

A. No, sir, Henry wasn't with me.

Q. Didn't you talk to me over here this morning?

A. Yes, sir.

Q. And didn't you tell me that this man, Henry Favors was with you?

A. Yes, but I didn't know; I was scared.

Q. Who were you scared of?

A. I don't know, sir.

Q. You do not know what you were scared of and you gave the police a statement, didn't you, George?

A. Yes, sir.

Q. You told the truth then, didn't you?

A. No, sir, I didn't tell the truth.

Q. You did not tell them the truth?

A. No, sir.

Q. Let me ask you, didn't you and Henry Favors rob some other folks?

A. No, sir.

Q. You did not rob anybody else?

A. No, sir.

A short recess was then taken after which the examination was resumed, as follows:

Q. George, did Henry Favors go with you that night to rob Frank Alesci and Tony Franklin?

A. Yes, sir.

Q. That was at the shoe shop out here on the corner of Court Street and North Rand Street?

A. Yes, sir.

Q. George, I will ask you if this is your signature here?

A. Yes, sir.

Q. Did you make a statement (without saying what the statement is, to the police about what occurred at Frank Alesci's place?

A. In August of this year.

Q. When you and this defendant went out and robbed Tony and Frank?

A. Yes, sir.

Cross-Examination.

By Mr. Lonesome:

Q. George, was the statement that you gave to the Police Department true or false?

A. True.

Q. You testified a moment ago that at the time you planned the robbery of this shoe shop that Henry Favors was not with you; is that true?

A. No, sir.

Q. Did you discuss this robbery with a boy named John Smith?

A. No, sir.

Q. George, since you left the witness stand during the recess did you talk with anyone concerning this case?

A. No, sir.

Q. You have not talked with anyone?

A. No, sir.

Q. I will ask you if you did not go out in the hall and talk to Mr. Herbert Bryan and Mr. Bill Hammack, who just testified a few minutes ago?

A. Yes, sir.

Q. You talked with them about the statement you had made in this case? Didn't they ask you to correct or reform that statement out in the hall?

Mr. Bryan: Who do you mean by "they"?

Mr. Lonesome: The two persons that he talked with.

Mr. Bryan: Do you mean Bill Hammack and myself?

Mr. Lonesome: That is right.

A. Yes, sir.

Q. And did they ask you that?

A. Yes, and I told them I had my own opinion of it.

Q. You have had your own opinion about it since you have been on the witness stand, have you not?

A. Yes.

Redirect Examination

By Mr. Bryan:

Q. Did I ask you to change your statement, the story that you told when you came here first?

A. No.

Q. When you got off the stand you went over in the corner and sat down?

A. Yes, sir.

Q. I did not talk to you further, did I?

A. No.

Q. I went over into my office, is that right?

A. Yes, sir.

Q. And you came back through this door and, in the presence of Mr. Hammack, is that right?

A. Yes, sir.

Q. He said, "This boy is now ready to tell the truth about the case"?

A. Yes, sir.

Q. And I asked you if you were going to tell the truth about this case, is that right?

A. Yes, sir.

Q. And that was the extent of my conversation with you, is not that right?

A. Yes, sir.

Q. And what you have told me since you have resumed the witness stand was the same thing you told me this morning when I asked you to tell me the truth and only the truth about what had happened in this case?

A. Yes, sir.

Recross-Examination

By Mr. Lonesome:

Q. What did Mr. Hammack tell you when he took you out in this hall?

A. I forget now.

Q. You said he did say something to you, did he not?

A. Yes, sir.

Q. Did not he, in so many words, say to you that if you did not change your statement the Court will be a little harsh on you?

A. I don't remember that.

Q. But he said something to you about changing your statement, did he not?

A. I forget about it.

Q. It was only in the past three or four minutes and yet you forget about it?

A. Yes, sir.

Q. As a matter of fact you forget about most of the testimony you gave on this witness stand?

A. I don't know.

The witness then stood aside.

FILED
APR 23 1957
JOHN T. FEY, Cle

Supreme Court of The United States

October Term, 1956

No. 719

HENRY HINTON FAVORS,
Petitioner,

v.

IRA M. COINER, ACTING WARDEN, WEST VIRGINIA PENITENTIARY, MOUNDSVILLE, WEST VIRGINIA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

BRIEF FOR RESPONDENT

W. W. BARRON,
Attorney General of West Virginia,
FRED H. CAPLAN,
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Charleston, West Virginia
Counsel for Respondent.

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BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

The petitioner, in setting out the questions presented for review (Pet. Br., p. 2), fairly states the circumstances alleged in his petition. He then poses questions as to whether, under such circumstances, the petitioner

was denied the due process of law guaranteed by the Fourteenth Amendment. Respondent believes that the tenor of such questions, when read together with the factual situation, tends to presuppose the truth of petitioner's allegations. The truth or falsity of such allegations must be determined before the questions presented by the petitioner can be ultimately answered. It is therefore submitted that the question is: Should this cause be remanded to the Supreme Court of Appeals of the State of West Virginia for a proper determination of the truth of the allegations in the petition?

STATEMENT

The statement of the petitioner (Pet. Br., p. 3) setting out the allegations contained in the petition is accurate.

ARGUMENT

As accurately related by petitioner (Pet. Br., p. 4), the Supreme Court of Appeals of West Virginia, without hearing or opinion, denied the instant petition for a writ of habeas corpus. Upon a re-examination of our position, heretofore advanced in this cause, it is respectfully suggested that the judgment below be vacated and that this case be remanded to the Supreme Court of Appeals of West Virginia for further proceedings, namely, a hearing on said petition to determine the validity of the allegations contained therein.

CONCLUSION

The judgment of the Supreme Court of Appeals of West Virginia denying the writ of habeas corpus should be vacated, and the case remanded to that court for further proceedings.

Respectfully submitted,

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of West Virginia,

FRED H. CAPLAN,
Assistant Attorney
General of West Virginia,

Charleston, West Virginia
Counsel for Respondent.